

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER 1995 SESSION

<p>FILED</p> <p>January 11, 1996</p> <p>Cecil W. Crowson Appellate Court Clerk</p>

BARRY SOUTHERLAND,

Appellant,

V.

STATE OF TENNESSEE,

Appellee.

)
) C.C.A. No. 01C01-9503-CC-00063
)
) Marshall County
)
) Hon. Lee Russell, Judge
)
) (Post-Conviction)
)
)

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OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
 Judge

OPINION

Appellant, Barry Southerland, was convicted of aggravated rape and aggravated kidnapping. He received concurrent life sentences. His convictions were affirmed by this Court; and the Supreme Court denied certiorari on August 29, 1988. On February 18, 1991, appellant's first Petition for Writ of Habeas Corpus was dismissed.¹ On January 29, 1993, appellant filed his second Petition for Writ of Habeas Corpus in the United States District Court alleging ineffective assistance of counsel. This Petition was dismissed on August 11, 1994. Appellant subsequently filed application for delayed appeal which was denied by this Court on December 20, 1994. On January 5, 1995, appellant filed for post-conviction relief alleging ineffective assistance of counsel. The trial court dismissed his petition, as untimely, on January 20, 1995, without conducting an evidentiary hearing. Appellant appeals that dismissal. We affirm.

Appellant maintains that his January 1995 post-conviction relief petition was timely. He argues that the statute of limitations was "tolled by the filing of the petition for habeas corpus filed in federal court on January 29, 1993." Both appellant's 1991 and 1993 habeas corpus writs are grounded in the allegation that he received ineffective assistance of counsel. Moreover, appellant's brief concedes that his 1993 petition for habeas corpus, alleging ineffective assistance of counsel, was in substance a petition for post-conviction relief.

Petitions for post-conviction relief must be filed within three years from the final action of the highest appellate court to which an appeal has been taken. Tenn. Code Ann. § 40-30-102 (1990). This Court has previously held that the "saving statute," Tenn. Code Ann. § 28-1-105 (1995), cannot be applied to toll the post-conviction statute of limitations. Sandusky v. State, No. 01C01-9404-CC-00142, slip op. at 5 (Tenn. Crim. App. March 2, 1995). Accordingly, a

¹ Appellant alleges that this Petition was dismissed by his attorney and without his knowledge.

voluntary dismissal of a post-conviction relief petition neither extends nor tolls the three year statute of limitations. Id.

Appellant's statute of limitations began to accrue on August 29, 1988. Prior to February 1991, appellant filed a writ of habeas corpus apparently alleging he received ineffective assistance of counsel. Habeas corpus petitions, however, are not the appropriate vehicle for sixth amendment attacks. Crum v. Conley, No. 02C01-9307-CC-00171 (Tenn. Crim. App. Feb. 16, 1994). Therefore, both appellant's 1989 and 1993 writs may be treated as petitions for post-conviction relief. Tenn. Code Ann. § 40-30-108 (1990).

On February 18, 1991, appellant's 1989 petition for post-conviction relief was voluntarily dismissed. Because we find that voluntary dismissals of post-conviction proceedings neither extend nor toll the three year statute of limitations, we hold that appellant's 1993 writ was merely an untimely petition for post-conviction relief. See Crum v. Conley, No. 02C01-9307-CC-00171 (Tenn. Crim. App. Feb. 16, 1994) (holding petitioner may not circumvent post-conviction statute of limitations merely by referring to post-conviction petition as writ of habeas corpus). Accordingly, we hold that appellant's untimely 1993 petition for post-conviction relief, though termed a writ of habeas corpus, neither extended nor tolled appellant's statute of limitation and, therefore, his 1995 petition was properly dismissed as untimely.

AFFIRMED

PAUL G. SUMMERS, Judge

CONCUR:

JOE B. JONES, Presiding Judge

JOSEPH M. TIPTON, Judge